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Contentious Commentary

Contract

The usual cohort

Interpreting contracts remains difficult.

The trend in contractual interpretation is unquestionably towards literalism, but older cases are seldom overruled and so remain capable of being hauled out, Zimmer frames and all, if they meet the parties' needs. It is possible, therefore, to have a scintilla of sympathy with the Chancellor's weary comment in *Credit Suisse Asset Management, LLC v Titan Europe 2006-1 plc* [2016] EWHC 969 (Ch) that:

> "The parties in their skeleton arguments and in their oral submissions relied upon the usual cohort of authorities: [*ICS*, *Chartbrook*, *Rainy Sky*, *Sigma* and *Arnold v Britton*]. Each of those cases can be, and usually is, cited in argument for its use of slightly different language or emphasis, depending upon the particular facts and the argument the party wishes to deploy."

The language and emphasis are in reality rather more than "slightly" different but, in any event, the advantage for a lower judge of this range of expression is that s/he can pick whatever quotes s/he wants in order to justify almost any outcome. Indeed, in *Titan*, the Chancellor went literal on one issue but purposive on another.

Titan is also further evidence that the ships that once steered English contract law have been replaced by financial contracts and, in particular, waterfalls in securitisation documents. Like *Hayfin Opal Luxco 3 Sarl v Windermere VII CMBS plc* [2016] EWHC 782 (Ch) (see May 2016), *Titan* concerned Class X notes, often called the "equity" in a securitisation. They are designed to secure for the holder of the Class X notes any surplus arising from the underlying assets after the payments due to the mainstream noteholders have been discharged.

The first issue was the calculation of the interest rate on the Class X notes. This depended on the difference between the interest rate due to the noteholders and the interest rates on the underlying, securitised, loans. The Class X noteholder argued that the interest on the underlying loans should include default interest if payable – doing so would increase the difference and hence increase the Class X interest rate. The relevant definition referred only to the "interest rate due on such Loan".

The Chancellor accepted that default interest is interest, but concluded that there were good reasons arising from the context why the informed reader would understand that, giving the words their ordinary and natural meaning, "interest rate was not intended to include default interest". Literalism pushed to one side.

The second issue was repayment of the principal due on the Class X notes. The monies for this were held in a secured account, so the Class X noteholder had no principal exposure to the underlying loans. The conditions said that the issuer "shall" redeem the notes on their maturity date. The Chancellor could see no reason why this should not be done, even though repayment of the Class X notes left no one, other than the charitable shareholders of the SPV that issued the notes, with an interest in any surplus. Literalism pulled centre stage.

If everything due on the underlying loans is paid, including default interest, the effect of the Chancellor's decision is that the orphan SPV will have a surplus in its hands, which it would presumably pay to its shareholders. The Chancellor rejected the argument that the intention of the structure cannot have been for substantial payments to be made to the charities.

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Reveille first

A contract is formed by conduct despite a requirement for signature.

You send a short-form contract to the other side. The contract says expressly that it will not be binding on the parties until signed by both. The other side signs. You do not sign, but you proceed to act in accordance with contract's terms as if the contract had been brought into existence. Can you sue for sums due under the contract even though you haven't signed it?

According to the Court of Appeal in *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443, yes. The Court of Appeal decided that the requirement that C sign the contract was a stipulation in C's favour that C could waive, as long as waiver did not cause any detriment to D. C had, by clear and unequivocal conduct known to D, accepted by conduct the offer in D's returning the signed contract. It was a fundamental legal policy that there should be certainty in commercial contracts, but it was also a fundamental legal policy that the reasonable expectations of reasonable honest businessmen should be protected. In *Reveille*, the Court of Appeal considered that it was promoting the latter policy, which trumped the former.

Spot the join

A contract signed by two out of three parties binds the two.

Lawyers trot out the phrase "joint and several" regularly, seldom defining, perhaps understanding, what it means. In *Marlbray Ltd v Laditi* [2016] EWCA Civ 476, Gloster LJ decided that joint and several liability gave rise to one joint obligation and as many several obligations as there are joint and several promisors. In effect, the obligation is joint or several at the election of the promisee because the promisee can sue all promisors jointly in one action or bring separate actions against one or more of the promisors in respect of their several obligations.

And in *Marlbray*, this analysis affected the outcome. C1 signed, purportedly on behalf of himself and C2, a contract to buy real property from D. C1 had no authority to sign on behalf of C2, who did not subsequently ratify the contract. The issue was whether C1 was bound by the contract with D even though C2 was not bound. Gloster LJ recognised that the issue was whether, objectively, it was the common intention of the parties that C1 should be bound even if C2 was not. Relying on the fact that the obligations under the contract were joint and several, Gloster LJ was satisfied that there was an intention for C1 and D to enter into a contract even if C2 was not a party. C1 could be severally or solely liable.

The Court of Appeal also decided that

Injunctions

New model injunction

The court can grant a free-standing notification injunction.

Injunctions are granted to restrain the invasion of a legal or equitable right. Freezing injunctions are hard to reconcile with this principle, but it is now beyond doubt that freezing injunctions exist. So a rationalisation of freezing injunctions is to treat the defendant as owing an obligation to the claimant not to dissipate assets for the purpose or with the effect of rendering a judgment futile. If a freezing injunction is granted, the court can add ancillary relief, such as requiring an affidavit of means or notification of an intention to dispose of an asset.

In *Holyoake v Candy* [2016] EWHC 970 (Ch), Nugee J was invited to grant ancillary relief without the freezing injunction. He concluded that he had jurisdiction to grant a standalone injunction that required the defendants to notify the claimants of an intention to dispose of assets so that the claimant could then seek a real freezing injunction if it so wished. If the court could restrain disposals of property, the judge could see no reason why the court could not restrain disposals made without prior notification.

The test for this new form "notification" injunction is largely the same as for an old form freezing injunction. This requires a good arguable case on the merits, in the sense of more than barely capable of serious argument but not necessarily one that the judge believes has a better than 50% chance of success. Nugee J rejected the "*Canada Trust* gloss" that a good arguable case requires a party to have "a much better argument on the material available". Then the court must also have objective facts from which it can infer that the defendant is likely to move assets abroad or dissipate them within the jurisdiction (though the court might be a bit less strict for a notification injunction than for a real freezing injunction). The court found that both tests were met in this case.

the contract between C1 and D was not invalidated by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which requires a contract for the sale of land to be in writing and signed by all the parties to the contract. All the parties did not mean all the parties who were purportedly bound by it. "It would", according to Gloster LJ, "make a mockery of the policy behind [section 2] if [C1] could rely on technical arguments... to escape from his several obligations". But what is the policy of a provision such as section 2 and the nature of any argument resting on it if not technical?

Arrested warranties

Typical warranty claim notification requirements in an SPA must be strictly complied with.

Teoco UK Ltd v Aircom Jersey 4 Ltd (25 April 2016) provides a useful summary of the case law relating to typical requirements in a corporate Sale and Purchase Agreement for the notification of warranty claims. Despite the case law indicating that these clauses are exclusion clauses that, if ambiguous, should be construed narrowly, *Teoco* perhaps illustrates a growing willingness of judges to strike out claims that fail to meet the strict requirements of a clause.

In *Teoco*, the clause made it a pre-condition of liability on a warranty that C gave notice of a claim, including reasonable details of the claim and a good faith estimate of the amount of the claim, as soon as reasonably practicable after C became aware of the claim and, in any event, by 31 July 2015 (some 20 months after the SPA had been signed). C then had to commence and serve proceedings in respect of the claims notified within six months of the notification.

The judge held that the notice in this case failed the meet the requirements of the clause. He decided that the notice did not notify a claim. It didn't say that it was a claim notice or identify the provisions in the SPA about claims notices, and it didn't identify the specific warranties alleged to have been breached. It was more a discussion of potential tax liabilities that might give rise to claims. This illustrates the difficulties of notification requirements for contingent liabilities, but the judge was clear that notice could still be given of contingencies.

The judge also decided that the claim form issued and served within the requisite six months was not in respect of the claims set out in the notification letter. The letter contained an "intimation of possible claims for sundry unidentified warranties... and an estimated minimum of quantum", whereas the Claim Form was "for a specific liquidated sum based on actual liability, a specific allegation of wrongdoing and breach of specifically identified Warranties." Notification had not therefore been given in respect of the claims subsequently pursued.

Further, the notice was not given within the requisite time period, ie as soon as reasonably practicable after C became aware of the claim. The long-stop date is not the only date to worry about.

Generally, the decision is strict, focussing on the aim of these clauses as providing commercial certainty to the seller. Great care is required when drafting warranty claim notices. A notice is not the same as a pleading, but *Teoco* eases a notice a little more in that direction – unless, of course, the wording of the clause departs from the current normal.

Bunking off

A contract for the sale of goods with a reservation of title clause may not be a contract for the sale of goods.

PST Energy 7 Shipping LLC v OW Bunker Malta Ltd [2016] UKSC 23 is, according to Lord Mance, metaphysical. It involved a party to whom bunkers (fuel for ships) had been supplied trying to avoid having to pay for the bunkers. The buyer argued that, by virtue of section 49 of the Sale of Goods Act 1979, a seller can only sue for the price of the goods if title in the goods has passed. Title had not passed in this case because: a retention of title clause said that title did not pass until payment; before payment was due, the bunkers had been used up in the propulsion of the vessel; so title never passed because there was nothing left in which title could pass. The real concern may have been a claim from the seller's supplier on the basis that the bunkers belonged to the supplier, which therefore had a claim against the ship, bringing with it a risk of double payment.

The Supreme Court's conclusion, echoing that of the Court of Appeal, was that the contract was not a contract for the sale of goods within the meaning of the Act. Instead, it was a sui generis transaction under which bunkers were supplied with express liberty to consume the bunkers despite the "buyer" not having any property in, or having paid for, them. The only question was whether, under this sui generis contract, the price was payable. It was.

The Supreme Court also said that, in any event, section 49 of the Sale of Goods Act is not a comprehensive code as to when a seller can sue for

the price. *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232 (aka *Caterpiller*) is therefore wrong.

Purposive interpretation

Purpose means dominant, not sole.

The sale of a business included provision for deferred consideration, which depended, amongst lots of other things, on the price obtained on an onsale of the business. The contract included an anti-avoidance provision that kicked in if any transaction was structured "with the purpose of reducing payments" for the deferred consideration.

A transaction was structured for that purpose, but did this purpose have to be the sole purpose, the dominant purpose, a substantial purpose or merely a purpose? In *Starbev GP Ltd v Interbrew Central European Holdings BV* [2016] EWCA Civ 449, the Court of Appeal followed Blair J in deciding that it had to be a dominant purpose, which it was.

Constitution

The decision of the electorate

EU law cannot define the electorate for the Brexit referendum.

Article 50 of the Treaty on European Union allows an EU member state "to withdraw from the Union in accordance with [the member state's] own constitutional requirements." The EU Referendum Act 2015 defines the electorate for the Brexit referendum in the usual way, excluding (as for Parliamentary elections) those who have moved abroad and have not been registered to vote in the UK for at least 15 years. In *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469, C argued that this 15 year rule infringed EU principles on freedom of movement because it penalised persons who have exercised their right of free movement.

The Court of Appeal disagreed. Following the decision of the German Constitutional Court in *Re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13, the Court of Appeal concluded that the effect of the reference in article 50 to a member state's "own constitutional requirements" was that the EU had surrendered whatever role its law might otherwise have had with respect to a member state's constitutional requirements for withdrawal. The definition of the electorate for a referendum was one of those constitutional requirements and, therefore, fell to be determined by reference to UK law alone.

Elias LJ went further. This interpretation of article 50 assumed that EU law - in particular, the right of free movement - could otherwise have had a role in determining the electorate for the Brexit referendum. Elias LJ observed that EU law only applies in the UK because section 2(1) of the European Communities Act 1972 says that it does. He considered that section 2(1) bound the UK to the rules of the club whilst the UK remained a member of the club. He did not believe that Parliament intended the club's rules to apply when the very question was whether the UK should continue to be a member of the club. Agreeing to join the EU was an exercise of untrammelled sovereign power; deciding whether or not to leave was a similar exercise of untrammelled sovereign power.

Thus, even if EU law had sought to define the electorate for an exit referendum, that law would not have applied in the UK because section

Tort

Gamblers anonymous

A bank does not owe a duty of care to a hidden reference-seeker.

The fons et origo of the law of negligent misstatement is *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. In *Hedley Byrne*, one bank contacted another to obtain a reference about a customer of the latter. The former bank was not seeking the reference for its own purposes but for an unnamed customer. The House of Lords held that the reference-giving bank owed a duty of care to the requesting bank's customer, and would have been liable for negligence but for the exclusion of liability in the reference.

Playboy Club London Ltd v Banca Nazionale del Lavoro SpA [2016] EWCA Civ 457 also concerned a bank reference. One bank asked another for a reference, but this time the requesting bank named its customer. The catch was that the named customer was acting as a front for another company, C, within the same group in order to disguise the fact that the reference related to the customer's gambling with C. Is this sufficient to distinguish the case from *Hedley Byrne*?

It is sufficient, according to the Court of Appeal. The bank thought it was assuming liability to the named customer, not to a third party. The reference was marked "given in strict confidential", which indicated that it should not be passed on to, let alone relied on by, third parties. "If [C] wishes to remain anonymous it is hardly just and reasonable for it to assert that a duty of care is owed to it when it deliberately conceals its existence." So C must suffer the losses (at least, not make the gains) from the bank's customer's presentation of dodgy cheques and subsequent disappearance. It can't redeem its financial position at the expense of the bank.

2(1) could not be interpreted as giving it any domestic legal effect.

The Court of Appeal also rejected the argument that the 15 year rule offended underlying common law constitutional principles such that the relevant parts of the EU Referendum Act were invalid. The Court of Appeal quoted comments in the Supreme Court that an attempt by Parliament to curtail democracy, the rule of law and other international norms might be unlawful. The 15 year rule was, however, not even close to being in that league.

Even if EU freedom of movement principles had been relevant, the CA decided that the 15 year rule did not breach those principles. The principles were only breached if a measure disadvantaged or penalised someone because she had exercised her right of free movement and, if so, the disadvantage or penalty was liable to deter an individual from exercising her right of free movement. The Court of Appeal concluded that the 15 year rule was too indirect and uncertain to be liable to deter someone from exercising the right of free movement given by EU law.

The Divisional Court, which decided that EU law did apply to the 15 year rule but was not infringed, had gone on to hold that the 15 year rule was, in any event, objectively justified as a matter of EU law: it had a legitimate aim (a connection with the UK as a qualification for voting in the referendum), and constituted a rational, consistent and proportionate means of achieving that aim. The Court of Appeal did not feel it necessary to go into this.

The Supreme Court refused permission to appeal against the Court of Appeal 's judgment.

Jurisdiction

Mining the depths

A claim can be brought against a parent for its subsidiary's pollution.

Lungowe v Vedanta Resources plc [2016] EWHC 975 (TCC) involved the controversial application of a number of controversial cases, both as to jurisdiction and the liability of parent companies.

Lungowe is a claim in England by 1,826 Zambians in respect of pollution caused by a copper mine in Zambia. The claim was brought against the Zambian company (D2) that operated the mine and also against the UK company (D1) that owns 79% of D2's shares (the Zambian Government owns the remaining 21%).

The first controversial issue was whether the numerous Cs had a claim against D1 at all. This turned on *Chandler v Cape* [2012] EWCA Civ 525, in which the Court of Appeal decided (purporting to apply *Caparo v Dickman* [1990] 2 AC 605) that employees could sue the parent company of their employer for asbestos-related injuries if: (1) parent and subsidiary were in the same business; (2) the parent had superior knowledge of the health and safety issues; (3) the subsidiary's work systems were unsafe, as the parent knew or should have known; and (4) the parent knew or should have known that the subsidiary or its employees would rely the parent using its superior knowledge for the employees' protection.

In concluding that there was a real issue to be tried, Coulson J stretched this approach considerably further in allowing those who lived in the vicinity of the mine to proceed against the parent. His was little more than a conclusion under the guise of not holding a mini-trial, without seriously addressing whether any of the *Chandler* requirements were or could be met.

The second controversial issue was the application of *Owusu v Jackson* [2005] QB 801. In *Owusu*, the European Court of Justice decided that an English court could not stay on forum non conveniens grounds proceedings against a defendant domiciled in England. The judge acknowledged that the reasoning in *Owusu* is open to serious question. The ECJ said that forum non conveniens undermined legal certainty as to jurisdiction because it meant that defendants could not be sure where they would be sued. That is nonsense because it is a defendant who invokes forum non conveniens in order to try to move the proceedings from the forum chosen by the claimant. However, the judge, not unreasonably, concluded that he was still bound by *Owusu*. He also declined to refer the case to the CJEU.

Coulson J contemplated that it might have been possible to distinguish *Owusu* if the Cs' case was an abuse of EU law but, having decided that there was a real issue to be tried between the Cs and D1, he thought that this conclusion was not open to him.

The third controversial issue concerned the effect of *Owusu* on jurisdiction over D2. On forum non conveniens grounds ignoring any effect from the inclusion of D1 in the proceedings, the judge said that he would, as was inevitable, have concluded that the Zambian courts were the appropriate courts to hear the claim against D2. However, since the claim against D1 was going ahead in England anyway because it could not be stayed, the undesirability of two sets of proceedings on the same

issues swung the balance in favour of D2 being sued in England too. As *Dicey* (the principal English law text on conflict of laws) comments, this is a distortion of forum non conveniens principles.

Finally, the judge decided that the case should in any event remain in England because the Cs would not obtain access to justice in Zambia. This was because the Cs could only bring a claim with the support of a conditional fee agreement or legal aid. CFAs are unlawful in Zambia and there is no chance of legal aid. The judge therefore decided that the English legal system should remedy the failings of its Zambian counterpart.

The judge also trotted out the usual judicial bromides that jurisdictional issues should not involve lengthy of witness statements, documents or argument, and should be dealt with quickly and cheaply. This assumes that whether a case continues in England or is moved elsewhere is something about which the parties should be largely indifferent. That is, of course, nonsense. Jurisdiction matters, which is why it is fought over so intensely and why there is so much law about it.

The Court of Appeal, if not higher, surely awaits.

Contentious Commentary is a review of legal developments for litigators

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